RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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Indiana's appellate courts confronted a variety of significant issues during the survey period October 1, 2015, to September 30, 2016. The Indiana Supreme Court saw the end of Justice Dickson's three decades of service in April and the appointment of Justice Slaughter in June.[1] Both the Indiana Supreme Court and the Indiana Court of Appeals addressed a wide range of issues that affect cases from their inception to their conclusion.[2] Some of the most significant developments are explored below.

I. SPEEDY TRIAL

Both the U.S. and Indiana Constitutions[3] broadly guarantee a criminal defendant's right to a speedy trial, while Indiana Criminal Rule 4 provides specific deadlines on which many defendants rely in challenging excessive pretrial incarceration or long delays between arrest and trial.

On the constitutional front, the Indiana Supreme Court found no due process violation in the State filing charges in 2013 for a murder committed in 1977 in *Ackerman v. State*.[4] Despite the thirty-six year delay, the justices found no actual and substantial prejudice from the deaths of three potential witnesses in the defendant's favor (the pathologist who performed the autopsy and two first responders at the scene of the death); that two other law enforcement personnel involved in the case no longer had any recollection of the event; and the unavailability of medical records reflecting two previous hospitalizations of the victim.[5]

On the rule front, however, a defendant prevailed in *Allen v. State*.[6] Indiana Criminal Rule 4(C) requires criminal defendants be brought to trial within a year unless the delay was caused by the defendant or court congestion.[7] *Allen* reiterated the responsibility of the trial court and the State—not the defendant—to

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1. *Supreme Court Justices*, COURTS.IN.GOV, https://mycourts.in.gov/JR/Default.aspx (last visited May 23, 2017).

2. Although the five members of the Indiana Supreme Court were unchanged from the appointment of Justice Rucker in 1999 until the retirement of Justice Boehm in 2010, the retirement of Justice Dickson marks a near complete change in membership since 2010, as only Justice Rucker remains as a justice with more than six years of service. *Id.*

3. U.S. CONST. amend. VI; IND. CONST. art. 1, § 12.

4. 51 N.E.3d 171 (Ind.), *cert. denied*, 137 S. Ct. 475 (2016).

5. *Id.* at 190.

6. 51 N.E.3d 1202 (Ind. 2016).

7. *Id.* at 1203 (citing IND. R. CRIM. P. 4(C)).

bring cases to trial.[8] Thus, even if the defendant's failure to appear for trial contributed to a delay, "such delay extended only for a reasonable period of time within which the court could take action to reschedule a new trial date and secure transportation of the incarcerated defendant for trial."[9] Although "reasonable period" was not defined, the court made clear it "certainly did not extend for more than 306 days as would have been required for the defendant's trial to comply with Rule 4(C)"—and therefore reversed and ordered the defendant discharged.[10]

The Indiana Court of Appeals also found Criminal Rule 4 violations in two cases. In *Arion v. State*,[11] the incarcerated defendant moved for a speedy trial after a warrant for burglary and other charges was served on him in September 2013.[12] In December the defendant filed a motion to dismiss because he had not been brought to trial within seventy days, which was denied, and in January 2014 he filed a motion to reconsider the motion and attached a copy of the warrant that had been served on him.[13]

The court of appeals found a Criminal Rule 4 violation and ordered the charges dismissed.[14] It concluded the trial court should have known the defendant was being held on the charges when he moved for a speedy trial and was unconvinced by the State's argument that the trial court "did not see" the warrant attached to the later motion.[15] Finally, the delay in transporting the defendant could not be used to penalize the defendant when there was no explanation why any necessary paperwork was not completed.[16]

Finally, *Tinker v. State*[17] provides a reminder of the important duty trial courts and the State have to bring a defendant to trial. In *Tinker*, some trial dates passed without a CCS entry explanation, despite Indiana Trial Rule 77(B) requirement that "[t]he judge of the case shall cause Chronological Case Summary entries to be made of all judicial events."[18] The court ordered discharge because it could "not remand for the trial court to explain those delays at this late date, as the record already should have contained the support required to determine their proper assignment."[19]

II. "REFUSAL" TO TAKE CHEMICAL TEST CLARIFIED

When a police officer has probable cause to believe a motorist has operated

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8. *Id.*
9. *Id.* at 1205.
10. *Id.*
11. 56 N.E.3d 71 (Ind. Ct. App. 2016).
12. *Id.* at 72.
13. *Id.* at 73.
14. *Id.* at 77.
15. *Id.* at 76.
16. *Id.* at 77.
17. 53 N.E.3d 498 (Ind. Ct. App. 2016).
18. *Id.* at 504.
19. *Id.*

a vehicle while intoxicated, the officer is required by statute to offer the motorist an opportunity to submit to a chemical test.[20] If the motorist "refuses to submit to a chemical test, the arresting officer shall inform the person that refusal will result in the suspension of the person's driving privileges."[21]

In *Burnell v. State*,[22] the Indiana Supreme Court addressed what constitutes a "refusal" to submit to such a chemical test. The court observed that a "physical failure to cooperate can amount to a refusal" and held a refusal "occurs when the conduct of the motorist is such that a reasonable person in the officer's position would be justified in believing the motorist was capable of refusal and manifested an unwillingness to submit to the test."[23]

In *Burnell*, the motorist was capable of refusal because she heard and understood the officer's offer to take a chemical test.[24] Moreover, a reasonable person in the officer's shoes was justified to believe she was unwilling to submit to the test because she "stepped away from the officer twice" after initially saying "I guess I gotta can take it."[25] Thus, even though the evidence "present[ed] conflicting inferences," the court upheld the trial court judgment of suspension because the defendant failed to carry her burden in appealing from a negative judgment.[26]

III. DEFENSE DEPOSITIONS AND EXPERTS

Although depositions are routinely conducted in criminal cases, lawyers representing indigent defendants are often expected to seek prior approval.[27] In *Hale v. State*, the trial court denied the defendant's request to depose two of the State's witnesses "after they had pleaded guilty to pending charges and were disclosed as State's witnesses."[28] The Indiana Supreme Court reversed, finding the defense's request satisfied the three-part test for discovery in a criminal case: the request (1) identified the two witnesses specifically, (2) explained why they were material to the State's case, and (3) the State made no show of a paramount interest in non-disclosure when "the motion was denied the same day it was filed, without explanation."[29]

The opinion offered "further guidance as to how to treat such motions in the

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20. IND. CODE § 9-30-6-2(a) (2016).

21. *Id.* § 9-30-6-7(a).

22. 56 N.E.3d 1146 (Ind. 2016).

23. *Id.* at 1150-51.

24. *Id.* at 1151.

25. *Id.*

26. *Id.*

27. Hale v. State, 54 N.E.3d 355, 357 (Ind. 2016). Although not discussed in the opinion, some Indiana counties have public defender agencies with their own budgets, which allow lawyers considerably more autonomy to pay expenses like depositions and experts without seeking court approval.

28. *Id.* at 358.

29. *Id.* (applying Dillard v. State, 274 N.E.2d 387, 392 (Ind. 1971)).

future."[30] All three requirements "should be administered so as to maximize pre-trial discovery," and, as to the third requirement, courts "must grant the request" without a showing of "paramount interest in nondisclosure."[31] The justices noted some concerns regarding materiality (the second part of the test), specifically that trial testimony is generally briefer than deposition testimony, defendants could use depositions "as a harassment technique" without "any real expectation of obtaining new information," and depositions used as a fishing expedition could impede rather than promote the administration of justice.[32]

The opinion concluded that in future cases trial courts should issue factual findings addressing the three-part test because trial judges are "in the best position to consider the sincerity of the parties' arguments regarding the three-part test, as well as the overall costs associated with the proposed depositions, and potential alternatives that may better promote pre-trial efficiency of the case."[33]

The court of appeals addressed a similar issue in *Schuck v. State*,[34] in which a trial court denied a defendant's motion for public funds for investigation expenses. Fundamental fairness entitles "an indigent defendant to an adequate opportunity to present his claims fairly within the adversary system."[35] However, "[a] court is not required to fund any and all experts the defense believes might be helpful."[36] The key inquiry is "whether the services are necessary to provide an adequate defense and whether the defendant specifies precisely how he would benefit from the requested expert services."[37]

In *Schuck*, private attorneys agreed to represent the defendant pro bono in a murder case, provided the trial court would approve funds to hire an investigator to question a witness who may have committed the crime.[38] The attorneys believed the investigator was necessary because the attorneys lacked expertise in criminal cases and were afraid they would be forced testify at trial in violation of Indiana Rule of Professional Conduct 3.7 if they were the only ones to question the witness.[39] Even though the defendant eventually pleaded guilty, the court nevertheless held the trial court improperly denied funds for the investigator.[40]

The opinion made clear the attorneys were not required to secure preapproval from the county public defender's office before asking the trial court for public

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30. *Id.* at 359.

31. *Id.* (emphasis omitted) (quoting *Dillard*, 274 N.E.2d at 393).

32. *Id.* at 359-60.

33. *Id.* at 360. In a footnote, the opinion noted alternatives to depositions that provide similar benefits, citing local rules from counties that permit "sworn tape-recorded interview[s]," and a rule that prohibits court-appointed counsel from using "private reporting firms" without the court granting leave for good cause. *Id.* at 360 n.6.

34. 53 N.E.3d 571 (Ind. Ct. App. 2016).

35. *Id.* at 574 (quoting Scott v. State, 593 N.E.2d 198, 199 (Ind. 1992)).

36. *Id.* (quoting Tidwell v. State, 644 N.E.2d 557, 560 (Ind. 1994)).

37. *Id.* (quoting *Tidwell*, 644 N.E.2d at 560).

38. *Id.* at 572-74.

39. *Id.* at 573-74.

40. *Id.* at 576.

funds. Indiana Public Defender Commission's Standard for Indigent Defense Services in Non-Capital Cases, Standard N, addresses when a person has hired private counsel but cannot afford to pay for an investigator necessary to prepare a defense and does not require consent of the public defender.[41] The court reversed and remanded for the trial court to determine the amount of public funding that should be awarded to reimburse the attorneys.[42]

IV. JURY ISSUES

Although a small fraction of Indiana criminal cases are resolved by jury trials, those relatively few cases generate a great deal of case law involving a wide range of issues from securing the jury trial, arguments of counsel, jury instructions, and the jury's deliberations.

A. Personal Waiver

In *Horton v. State*,[43] the defendant "merely remained silent while his attorney requested a bench trial on the second phase of a bifurcated trial." The justices emphasized the requirement of a "personal waiver" is "rooted in Indiana Code section 35-37-1-2 and longstanding precedent" to ensure that felony prosecutions "will not proceed to a bench trial against the defendant's will by demanding direct evidence that waiver is the defendant's choice."[44] Because the defendant's silence fell "well short of personal waiver, the trial court committed fundamental error in proceeding to a bench trial."[45]

The court of appeals applied *Horton*'s personal waiver requirement from a bench trial to the guilty plea context in *Saylor v. State*.[46] There, the defendant did not personally waive his right to a jury trial for a habitual offender charge; trial counsel telling the judge his client is waiving the right is not sufficient.[47] Therefore, the court vacated the habitual offender enhancement and remanded the case for a new trial on that charge.[48]

B. Prosecutor's Comments During Closing Argument

Although claims of prosecutorial misconduct can arise in a variety of settings, they appear most common during closing arguments of jury trials.[49] In *Miles v.*

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41. *Id.* at 576.
42. *Id.*
43. 51 N.E.3d 1154, 1155 (Ind. 2016).
44. *Id.* at 1160.
45. *Id.* at 1155.
46. 55 N.E.3d 354 (Ind. Ct. App.), *trans. denied*, 62 N.E.3d 1203 (Ind. 2016).
47. *Id.* at 366.
48. *Id.* at 367.
49. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 48 IND. L. REV. 1241, 1253-55 (2015).

State,[50] the trial court interrupted a deputy prosecutor's closing argument, which included a PowerPoint slide that suggested the defendant had a burden to explain what happened.[51] The slide was not read to the jurors, but some may have read it.[52] The trial court admonished the jury that the defendant was not required to "present any evidence to prove his innocence or to prove or explain anything."[53]

Because the defendant did not move for mistrial, he was required to establish fundamental error.[54] In light of the jury instruction on the presumption of innocence, the trial court's admonition, and "the abundant evidence of guilt," the court of appeals concluded the defendant had not demonstrated, "such an undeniable and substantial effect on the jury's decision that a fair trial was impossible."[55]

As a final point, the court of appeals noted in a footnote that its "review of this issue has been hampered by the defendant's failure to make the content of the slide part of the record at trial so that on appeal we might know what the jury may have read from the allegedly prejudicial slide."[56] In cases involving slides or other displays to the jury, trial counsel should ensure a photograph or electronic copy of the material is made part of the record. Establishing facts surrounding the length of time the material was displayed to the jury may also be important to later appellate review.

C. Jury Instructions

The Indiana Supreme Court discussed jury instructions in three significant cases, ordering new trials based on erroneous instructions in two.

First, *Hernandez v. State*[57] involved a challenge to the denial of a defense request for an instruction on the affirmative defense of necessity.[58] Long-standing decisional law requires a requested instruction on "any theory or defense which has some foundation in the evidence," even if the evidence is weak and inconsistent, so long as there is some probative value to support it.[59] Testimony at trial supported each of the six necessity factors, and "[e]ven if there is only a 'scintilla' of evidence in support of a criminal defendant's proposed defense instruction, it should be left to the province of the jury to determine whether that evidence is believable or unbelievable."[60]

The failure to instruct on the defense of necessity may have impacted the

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50. 51 N.E.3d 305 (Ind. Ct. App.), *trans. denied*, 49 N.E.3d 107 (Ind. 2016).
51. *Id.* at 311-12.
52. *Id.* at 312.
53. *Id.*
54. *Id.*
55. *Id.* (quoting Jerden v. State, 37 N.E.3d 494, 498 (Ind. Ct. App. 2015)).
56. *Id.* at 311 n.2.
57. 45 N.E.3d 373 (Ind. 2016).
58. *Id.* at 374.
59. *Id.* at 376 (quoting Toops v. State, 643 N.E.2d 387, 389 (Ind. Ct. App. 1994)).
60. *Id.* at 378.

jury's verdict because the jurors could have found the defendant guilty even if they believed his testimony, which supported his lawful defense.[61] Therefore, the error was not harmless and a new trial was ordered.[62]

In the second case, *Keller v. State*,[63] the supreme court addressed the propriety of a jury instruction that defined "dwelling" in a burglary case of a vacant farmhouse.[64] Dwelling is defined by statute as "a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging."[65] In *Keller*, the trial court gave a more expansive definition, which included the following: "Any such place where a person keeps personal items with the intent to reside in the near future is considered a dwelling."[66]

The majority held the added language improperly emphasized "a set of facts that would satisfy the statutory definition of a dwelling," which "restricted the jury's discretion in applying the statutory definition in light of all the admitted evidence about the farmhouse. This also misled the jury by encouraging it to single out certain facts while ignoring others that it may and should consider."[67] Finally, the court reiterated that the existence of language in appellate opinions "does not make it proper language for instructions to a jury," especially language from sufficiency of the evidence cases "because the determination is fundamentally different."[68]

Justice Massa, joined by Chief Justice Rush, dissented, observing that the quoted language came from an appellate opinion that, "in no uncertain terms, identified a set of circumstances where a 'dwelling' would exist," and reversal was not warranted simply because the trial court "made the judgment call" to add that language.[69] The dissent suggested if the majority disagreed with the holding of the earlier case, "it could do so directly (rather than declining to reach the issue by limiting its holding to the jury instruction), and sustain the adequacy of the

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61. *Id.*

62. *Id.* at 379.

63. 47 N.E.3d 1205 (Ind. 2016), *reh'g denied*, (Apr. 11, 2016).

64. *Id.* at 1208.

65. *Id.* at 1207 (quoting IND. CODE § 35-31.5-2-107 (2016)).

66. *Id.*

67. *Id.* at 1208.

68. *Id.* at 1209 (internal quotation marks and citations omitted). Shortly after *Keller* was decided, the court of appeals cited it in rejecting a challenge to a jury instruction that stated "[a] knowing killing may be inferred from the use of a deadly weapon in a way likely to cause death." Miles v. State, 51 N.E.3d 305, 311 (Ind. Ct. App.), *trans. denied*, 49 N.E.3d 107 (Ind. 2016). The opinion summarized *Keller* as "holding language from appellate opinion that emphasized certain facts was improper for jury instruction and invaded the province of the jury, requiring reversal of conviction" but noted that *Bethel v. State*, 730 N.E.2d 1242, 1246 (Ind. 2000), had upheld a similarly worded instruction, that the jury could "infer intent to commit murder from the use of a deadly weapon in a manner likely to cause death or great bodily injury." *Miles*, 51 N.E.3d at 311.

69. *Keller*, 47 N.E.3d at 1210 (Massa, J., dissenting).

jury instruction given based on the state of the law *at that time*."[70]

In a third case involving alcohol concentration equivalents, however, the supreme court upheld a challenged instruction. In *Pattison v. State*,[71] the jury was instructed that it "shall presume" a person with at least a 0.08 alcohol concentration equivalent (ACE) at the time of a chemical test was driving with at least that ACE if the chemical test was performed within three hours.[72] The instruction concluded, "the presumption is rebuttable."[73]

The Indiana Supreme Court upheld the mandatory rebuttable presumption instruction, which is constitutional as long as it "maintains the State's obligation to prove every element beyond a reasonable doubt."[74] It reasoned the instruction's presumption did not relieve the State of its burden to prove the defendant's ACE "but merely negate[d] the need for live testimony explaining retrograde extrapolation" to determine his ACE at the time he was driving, which "makes pragmatic and scientific sense."[75] Because the presumption is rebuttable, defendants are free to present relevant evidence, such as the consumption of alcohol after driving or that the results were affected by the use of an inhaler.[76]

Finally, seemingly taking a different path from *Keller*, the court of appeals concluded in *Cowans v. State*,[77] that "a defendant charged with resisting law enforcement by fleeing by vehicle would be entitled, if he so requested, to have a jury instruction regarding the definition of the word 'flee.'"[78] Concerned about the uncertainty regarding when someone must pull over police, the court wrote:

> If a motorist on a ten-lane highway sees flashing lights, is she required to "stop in her tracks" to avoid committing a felony? If a motorist is aware that there are criminals impersonating police officers in the area, and sees flashing lights on an isolated road at night, is he required to "stop right there" to avoid committing a felony? It would be an intolerable state of affairs if basic common sense, not to mention the explicit advice of many police departments, turned ordinary citizens into felons.[79]

The court explained that "a person who drives to a location of greater safety for her or the officer, intending only to be in a location of greater safety, is not 'fleeing' from the police" because she is not attempting to "avoid arrest," or "escape law enforcement," or "prevent apprehension and punishment."[80] Drivers

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70. *Id.*
71. 54 N.E.3d 361 (Ind. 2016).
72. *Id.* at 363-64.
73. *Id.* at 364.
74. *Id.* at 367 (citing Francis v. Franklin, 471 U.S. 307, 314 (1985)).
75. *Id.*
76. *Id.* at 368-69.
77. 53 N.E.3d 540 (Ind. Ct. App. 2016).
78. *Id.* at 545-46.
79. *Id.* at 544-45.
80. *Id.* at 545.

have some discretion in deciding when to pull over, which is ultimately an issue for the factfinder, who must consider "myriad facts: how long the driver continued, the speed, the use of hazard lights, the location, the weather, the surroundings, the presence of bystanders, the availability of places to stop, the credibility of witnesses, etc."[81]

Although not suggesting verbatim instructional language, the court made clear an instruction

> would explain that a person who is attempting to escape police, or attempting to unnecessarily prolong the time before he is stopped, would be fleeing. The definition should also explain, however, that if a reasonable driver in the defendant's position would have felt unsafe to come to an immediate halt, and if the defendant took reasonable steps to increase the safety of the stop without unnecessarily prolonging the process, then the defendant was not fleeing. In short, the jury instruction would put the question of whether the driver had an "adequate justification" squarely before the factfinder.[82]

D. Jury Deliberations

In 2014, the Indiana Supreme Court clarified the standards for addressing claims of unauthorized contacts and communication with jurors in *Ramirez v. State*.[83] The court explained:

> Defendants seeking a mistrial for suspected jury taint are entitled to the presumption of prejudice only after making two showings, by a preponderance of the evidence: (1) extra-judicial contact or communications between jurors and unauthorized persons occurred, and (2) the contact or communications pertained to the matter before the jury. The burden then shifts to the State to rebut this presumption of prejudice by showing that any contact or communications were harmless. If the State does not rebut the presumption, the trial court must grant a new trial. On the other hand, if a defendant fails to make the initial two-part showing, the presumption does not apply. Instead, the trial court must apply the probable harm standard for juror misconduct, granting a new trial only if the misconduct is "gross and probably harmed" the defendant. But in egregious cases where juror conduct fundamentally compromises the appearance of juror neutrality, trial courts should skip *Currin*'s two-part inquiry, find irrebuttable prejudice, and immediately declare a mistrial. At all times, trial courts have discretion to decide whether a defendant has satisfied the initial two-part showing necessary to obtain the presumption of prejudice or a finding of irrebuttable

81. *Id.* at 546.

82. *Id.*

83. 7 N.E.3d 933 (Ind. 2014).

prejudice.[84]

Although the cases applying *Ramirez* last survey period did not result in a reversal,[85] this year a divided Indiana Supreme Court did find unauthorized communication to warrant a new trial. In *Wahl v. State*,[86] a juror contacted the trial court to advise that the alternate juror, who was instructed not to participate in deliberations, had "immediately began to involve himself in the deliberations and began taking over the deliberations by leading discussions."[87]

The majority found the juror's affidavit established the alternate's participation "was an external influence that pertained to the case" and created a presumption of prejudice.[88] Because the State did not rebut the presumption by showing the jury was nevertheless impartial, a new trial was ordered.[89] Justice Massa dissented, noting the "incomplete record" and need to "know more" before ordering a new trial.[90]

But in *Pribie v. State*,[91] the court of appeals quickly dispatched a challenge by a defendant in a case where a juror told the bailiff that she "knew people on both sides" of the case.[92] The bailiff responded that they lived in a small, close community and asked whether the people the juror recognized were close friends.[93] The juror said no, and the bailiff then asked whether it would prejudice her decision.[94] The bailiff did not bring the issue to the judge's attention and the defendant and counsel were not present for the investigation.[95] The court of appeals found the bailiff's actions "inappropriate" but harmless error because if the "proper procedure had been followed, the trial judge, rather than the bailiff, would have asked substantially the same questions as the bailiff."[96]

V. PUBLIC TRIALS IN THE TWITTER AGE

The Indiana Code of Judicial Conduct requires judges, unless given prior approval by the Indiana Supreme Court, to prohibit "broadcasting, televising, recording, or taking photographs in the courtroom" and adjacent areas while court

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84. *Id.* at 939 (citations omitted).

85. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 49 IND. L. REV. 1023, 1032-34 (2016).

86. 51 N.E.3d 113 (Ind. 2016), *reh'g denied*, (May 17, 2016).

87. *Id.* at 115 (internal quotation marks omitted).

88. *Id.* at 117.

89. *Id.*

90. *Id.* (Massa, J., dissenting).

91. 46 N.E.3d 1241, 1251 (Ind. Ct. App. 2015), *aff'd*, 47 N.E.3d 629 (Ind. Ct. App. 2015), *withdrawn from bound volume* (June 22, 2016), *trans. denied*, 48 N.E.3d 316 (Ind. 2016).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

is in session.[97] In *Compton v. State*,[98] the court of appeals rejected a defendant's claim that allowing media to send live updates of the trial on Twitter violated his due process rights.[99] The court declined to address whether Tweeting live updates was "broadcasting" under the judicial code because "broadcasting is not inherently prejudicial" and the defendant failed to show any specific prejudice to him considering the trial court's instructions to jurors, the media, and the attorneys regarding the use of Twitter.[100]

A few months later, in February 2017, the Judicial Qualifications Commission issued an advisory opinion on the subject, taking a similar view and concluding:

> means of instant communication, such as Twitter or microblogging, in the courtroom is not considered broadcasting under Rule 2.17 of the Code of Judicial Conduct, except in those limited situations when a user transmits video or audio of court proceedings or a link to videotaped court testimony. Further . . . a judge continues to act within the spirit of the Code of Judicial Conduct if he or she imposes reasonable restrictions on how and when an individual may use Twitter or other electronic communication tools during courtroom proceedings.[101]

VI. CRIME OF NOT A CRIME?

As suggested in previous survey articles, challenges to the sufficiency of evidence in a criminal case are often raised by frequently fail. This section begins with cases where the appellate courts reversed for insufficient evidence and then turns to those where convictions were upheld based on the constitutionality of statues or a finding of sufficient evidence.

A. Not a Crime

1. "Household or Family Member" in Domestic Battery Statute.—Captioned "Family or household member," Indiana Code section 35-31.5-2-128 lists several relationships that may, along with other required elements, enhance a battery conviction. At issue in *Suggs v. State*,[102] were Indiana Code section 35-31.5-2-128(a)(4), "is related by blood or adoption to the other person," and Indiana Code section 35-31.5-2-128(a)(5), "is or was related by marriage to the other

97. IND. CODE JUD. CONDUCT R. 2.17.

98. 58 N.E.3d 1006 (Ind. Ct. App.), *trans. denied*, 64 N.E.3d 1205 (Ind. 2016).

99. *Id.* at 1009-10.

100. *Id.* at 1011-12.

101. Advisory Opinion #1-17, at 4, http://www.in.gov/judiciary/jud-qual/files/jud-qual-adops-1-17.pdf (last visited May 12, 2017).

102. 51 N.E.3d 1190 (Ind. 2016).

person."[103] Although the statute does include in-laws, use of the term "related by marriage" was not "intended to include an infinite variety of relationships whose only connection is a marriage or series of marriages identified somewhere on the remote branches of a family tree."[104] The victim was "the sister of a brother who was once married to the defendant's aunt"; thus, although "related by blood to her own brother and related by affinity to her brother's wife (the sister of Suggs' mother), she is not related by blood or affinity to Suggs."[105] Concluding that the General Assembly intended "to employ the term in its commonly understood meaning namely, related by 'affinity,'" the justices reversed.[106]

2. Feticide Does Not Apply to Women Ending a Pregnancy.—In *Patel v. State*,[107] a woman who took abortion-inducing medication to terminate her pregnancy was convicted of feticide in the first case in Indiana in which the State "used the feticide statute to prosecute a pregnant woman (or anyone else) for performing an illegal abortion."[108] The court of appeals noted that prior Indiana Supreme Court precedent[109] had held "illegal abortions are governed by 'the provisions regulating abortion' (now in Title 16), and not the feticide statute (still in Title 35)."[110] The court could not conclude the General Assembly "intended for the specific provisions and lesser penalties in Indiana Code Section 16-34-2-7 to be subsumed by the general and more punitive feticide statute."[111] Finally, rejecting the State's reading of the statutes, the court found it would be "illogical to presume that our legislators specifically exempted pregnant women from prosecution for those types of abortion they found to be most odious while allowing prosecution of pregnant women for other types of abortions pursuant to the feticide statute," concluding "the legislature never intended the feticide statute to apply to pregnant women in the first place and therefore never saw the need to create an exception."[112]

3. Lack of Proximate Cause for Police Officer's Injuries.—In *Moore v. State*,[113] the defendant challenged his felony resisting law enforcement conviction

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103. *Id.* at 1193.

104. *Id.* at 1194.

105. *Id.* at 1192, 1195.

106. *Id.* at 1195.

107. 60 N.E.3d 1041 (Ind. Ct. App. 2016).

108. *Id.* at 1058.

109. *Id.* (citing Baird v. State, 604 N.E.2d 1170 (Ind. 1992)).

110. *Id.* at 1059.

111. *Id.*

112. *Id.* at 1061-62. The opinion also reduced a Class A felony conviction for neglect of a dependent to a Class D felony. *Id.* at 1062. The defendant's conduct before the birth of her child could not be considered, and expert testimony on the possibility of survival with earlier treatment fell short of satisfying the State's burden to prove that her failure to provide medical care resulted in the baby's death. *Id.* at 1053-54.

113. 49 N.E.3d 1095, 1108 (Ind. Ct. App. 2016), *trans. denied*, No. 49A02-1505-CR-321,

because it was elevated based on injury to the police officer who fell while chasing him.[114] The majority found earlier precedent "troubling" because it had not framed the issue in terms of proximate cause, and "causation for purposes of a criminal conviction must be proximate, rather than contributing."[115] Although the injured officer "would not have received his injury if he had not pursued" the defendant, the "actual cause" of the fall was "not clear from the record" and the defendant "did not put [the officer] in a position where his only option was to suffer injury."[116] Because there was insufficient evidence to support causation of the injury, the case was remanded for entry of conviction as a Class A misdemeanor.[117]

Judge Bradford dissented, noting the trial court's role as fact-finder and concluding "it is not unreasonable to anticipate that a consequence of fleeing from the police would be that an officer could fall and be injured during the ensuing chase."[118]

B. Case Upholding Convictions or Criminal Code Sections

1. Synthetic and Look-Alike Drugs.—In *Tiplick v. State*,[119] the Indiana Supreme Court rejected several constitutional challenges to Indiana's synthetic and look-alike drug statutes.

First, in rejecting a vagueness challenge to the synthetic drug statute, the court reas1oned that a person with ordinary *experience and knowledge* may not know "what [(1–(5–fluoropentyl)indol–3–yl)-(2,2,3,3-tetramethylcyclopropyl)methanone] is made of, but that is not the test; rather, it is whether a person of ordinary *intelligence* would understand his conduct was proscribed."[120] But "an ordinary Hoosier, armed with this chemical formula for XLR11, could determine through appropriate testing whether he was attempting to sell any products containing it," which is what is required of penal statutes.[121]

Nor was the court persuaded that the statutory scheme presents a "statutory maze" that prevents a person of ordinary intelligence from being able to discover which conduct is proscribed.[122] "Synthetic drug" is defined in section 321, which "names the Section 4.1 emergency rules as the only additional source for prohibited substances, and Section 4.1(c) describes where to look for those

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2017 WL 237751 (Ind. Jan. 12, 2017).

114. *Id.* at 1098.

115. *Id.* at 1108.

116. *Id.*

117. *Id.*

118. *Id.* at 1109 (Bradford, J., dissenting).

119. 43 N.E.3d 1259 (Ind. 2015).

120. *Id.* at 1263.

121. *Id.*

122. *Id.*

published rules," based on statutory procedures.[123] Rather than a "maze," the statutes are "a chain with three links—three discrete statutes which give clear guidance as to how to find everything falling within the definition of 'synthetic drug' under Section 321."[124]

As to the look-alike statutes, the court acknowledged that the terms "substance," "dosage unit," "consistency," "control," and "nature" are undefined.[125] Nevertheless, it found "there is no construction of these phrases which would 'embrace a vast assortment of very acceptable and even salutary conduct that is clearly not criminal in nature,' thus rendering the statute unduly vague despite inclusion of a specific intent requirement."[126]

Finally, the unanimous opinion concluded as a matter of first impression that the General Assembly may delegate rule-making power to an administrative agency even if violation of such rules would result in penal sanctions.[127] Specifically, the Pharmacy Board "has merely been given the power to determine, via emergency rule, whether additional substances should qualify as 'synthetic drugs' under Section 321"; the "rules are expressly incorporated into Section 321," which means "disobedience is in violation of the statute, and not of a rule of the ministerial board"; and the Pharmacy Board can only exercise its power when a substance "(1) has been scheduled or emergency scheduled by the United States Drug Enforcement Administration; or (2) has been scheduled, emergency scheduled, or criminalized by another state."[128]

2. Indiana's RICO (Corrupt Business Influence) Statute.—Indiana's Racketeer Influenced and Corrupt Organizations ("RICO") Act requires "a pattern of racketeering activity," which is defined by statute as "engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents."[129]

In *Jackson v. State*,[130] the Indiana Supreme Court acknowledged differences between the federal and Indiana RICO Acts, noting under the Indiana statute "the State is not required to prove that racketeering predicates amount to or pose a threat of continued criminal activity."[131] The opinion acknowledged that two earlier appellate opinions had read a "continuity requirement" into the statute and

123. *Id.* at 1264.
124. *Id.*
125. *Id.*
126. *Id.* at 1265 (quoting Brown v. State, 868 N.E.2d 464, 468 (Ind. 2007)).
127. *Id.* at 1267.
128. *Id.* at 1269 (internal quotation marks and citations omitted).
129. IND. CODE §§ 35-45-6-1(d), 6-2(2) (2016).
130. 50 N.E.3d 767 (Ind. 2016).
131. *Id.* at 771.

disapproved those cases.[132]

The plain language of the Indiana statute requires proof that two or more predicate criminal acts were "not isolated," and thus "continuity" remains a relevant consideration.[133] The opinion candidly acknowledged it had not provided "a precise formulation on what proof will suffice."[134] In some cases "proving that two or more criminal incidents are not isolated will be straightforward, as the very nature of the crimes will suggest that they are not sporadic."[135] But in others proof will be "more elusive, perhaps indicating that the State is overreaching in its attempt to obtain a conviction under the Indiana RICO Act."[136] Thus "future case law will shape and bring clarity to the concept of 'not isolated.'"[137]

Applying these principles in *Jackson*, the court affirmed the corrupt business influence conviction against a defendant who acquired money "from multiple armed robberies."[138] The defendant "orchestrated" the "planning and coordination" of three "increasingly sophisticated" robberies during the same month, allowing a jury to "reasonably infer from the nature of the crimes that they were not isolated or sporadic."[139]

3. Conditional Threat Language Constitutes Intimidation.—Indiana's intimidation statute requires proof of a threat "with the intent . . . that the other person be placed in fear of retaliation for a prior lawful act."[140] Some Indiana appellate cases had found insufficient evidence when anger, conditional language,

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132. *Id.* at 775 (disapproving Waldon v. State, 829 N.E.2d 168 (Ind. Ct. App. 2005); Kollar v. State, 556 N.E.2d 936 (Ind. Ct. App. 1990)).

133. *Id.* at 776.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 769-70, 777. The court of appeals, however, reversed a conviction in its first case to begin bringing "clarity to the concept of 'not isolated.'" *Id.* at 776. In *Robinson v. State*, 56 N.E.3d 652 (Ind. Ct. App.), *trans. denied*, 59 N.E.3d 252 (Ind. 2016), the defendant merely shoplifted or attempted to shoplift similar items from the same store. The court reasoned there was no evidence of an ongoing criminal enterprise, no evidence of "extensive planning or increasing sophistication," and no accomplices. *Id.* at 659. Moreover, "the crimes were isolated and sporadic." *Id.*

140. IND. CODE § 35-45-2-1(a)(2) (2016).

or threats were aimed at future action.[141] In *Roar v. State*,[142] however, the justices adopted a court of appeals opinion that disapproved of that approach and instead concluded:

> Mere use of conditional language in the course of communicating a threat does not vitiate the statute's application when the factual predicate for the threat was a prior lawful act of the victim. Stated another way, the language a defendant uses in communicating a threat may be relevant to the fact-finder's assessment of the defendant's intent, but the language used is not the only relevant consideration.[143]

Thus, the intimidation conviction in *Roar* was upheld against a defendant who told an apartment manager who left an eviction notice that he would kill her if she returned to the property because he communicated a threat to the manager with the intent to place her in fear of retaliation for a prior lawful act of leaving the notice.[144]

4. "Fighting" Requires Physical Altercation.—In *Day v. State*,[145] the Indiana Supreme Court addressed the meaning of "fighting" in the disorderly conduct statute. As an initial matter, the court concluded the statute applies to both public and private disturbances, and thus a defendant in a domestic encounter was "not immune from prosecution simply because he confined his 'fighting' to his house."[146]

But "fighting" includes only "physical altercations" and does not extend to "verbal altercations."[147] Because the word has both a broad and narrow meaning, the justices applied rules of statutory construction to adopt the narrow meaning.[148] Based on the rule of lenity, "[j]udicially stretching" the term fighting to include commonplace verbal altercations "would deprive Hoosiers of fair notice and impinge upon our legislature's power to define the law."[149]

Nevertheless, the court upheld the defendant's conviction because a reasonable factfinder could have found that his "intentional, point-blank spitting"

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141. *See, e.g.*, Causey v. State, 45 N.E.3d 1239, 1242 (Ind. Ct. App. 2015) ("While the words 'shoot' and 'kill' may relate to injury, they do not necessarily relate to unlawful injury, as would be required to constitute a 'threat' under the statute."); C.L. v. State, 2 N.E.3d 798, 801 (Ind. Ct. App. 2014) ("[W]hile C.L.'s threats against his grandfather are condemnable and reprehensible, the statements were not directed at an identifiable prior act. Rather, they each point to a specific future act.").

142. 54 N.E.3d 1001 (Ind. 2016).

143. Roar v. State, 52 N.E.3d 940, 943 (Ind. Ct. App.), *aff'd in part, vacated in part*, 54 N.E.3d 1001 (Ind. 2016).

144. *Id.* at 944.

145. 57 N.E.3d 809 (Ind. 2016).

146. *Id.* at 813.

147. *Id.*

148. *Id.*

149. *Id.* at 814.

on the victim was a physical altercation.[150]

5. Refusal to Identify Conviction Affirmed.—In *Weaver v. State*,[151] a man who had been stopped by the police and who was unable to produce his license engaged in an obdurate discussion with police about his name and only provided his date of birth after being handcuffed and questioned for sixteen minutes.[152] Indiana's statute criminalizes the refusal to provide a person's "name, address, and date of birth" or a driver's license in their possession.[153] In a short per curiam opinion, the Indiana Supreme Court agreed with the dissenting court of appeals' opinion of Judge Altice that the evidence was sufficient to support the conviction.[154]

6. Enhanced Burglary Even Though Occupant Recently Died.—Burglary is enhanced when breaking into a "dwelling," which is defined by statute as "a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging."[155] Decisional law has explained "burglary of a dwelling is not so much an offense against property as it is an offense against the sanctity and security of habitation."[156]

As a matter of first impression in Indiana, the court of appeals held in *Howell v. State* that "dwelling" includes "buildings and structures that have been occupied in the immediate past by a recently deceased resident," an interpretation consistent with the purpose of providing "an increased penalty for burglarizing a dwelling because of the potential danger to the probable occupants."[157]

VI. APPELLATE SENTENCE REVIEW UNDER RULE 7(B)

For many years, substantive appellate sentence review under Appellate Rule 7(B) was a one-way street, with the supreme court reducing a few sentences on transfer each year.[158] That rule, which implements the Indiana Constitution's power to review and revise sentences, allows appellate courts to revise a statutorily authorized sentence "if, after due consideration of the trial court's decision, the Court find that the sentence is inappropriate in light of the nature of the offense and the character of the offender."[159] As summarized in recent surveys, the Indiana Supreme Court took a different course in 2012 in issuing opinions reinstating the trial court's sentence after vacating the court of appeals-

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150. *Id.*

151. 56 N.E.3d 25 (Ind. 2016).

152. *Id.* at 26.

153. *Id.* (quoting IND. CODE § 34-28-5-3.5 (2016)).

154. *Id.*

155. IND. CODE § 35-31.5-2-107 (2016).

156. Howell v. State, 53 N.E.3d 546, 549 (Ind. Ct. App.), *trans. denied*, 54 N.E.3d 371 (Ind. 2016).

157. *Id.* at 550 (internal quotation marks and citation omitted).

158. *See* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 46 IND. L. REV. 1033, 1057-62 (2013).

159. IND. R. APP. P. 7(B).

ordered reductions; the court also became considerably less likely to grant transfer to reduce a sentence.[160]

A. Sentences Reduced

During last year's survey period, the justices reduced just one sentence, in a drug case, while the court of appeals reduced nine in a variety of cases.[161] During this year's survey period, defendants were considerably less successful, with one reduction and one reinstatement at the supreme court and just three reductions at the court of appeals.

1. Indiana Supreme Court.—In short per curiam opinions during the survey period, the Indiana Supreme Court reduced one sentence and reversed the court of appeals' reduction in another. First, in *Eckelbarger v. State*,[162] the justices reviewed an aggregate sentence of thirty-two years for three counts of dealing methamphetamine (by delivery in two counts and manufacture in another) and possession in a fourth count.[163] The three-justice majority reiterated that "[c]onsecutive sentences are not appropriate when the State sponsors a series of virtually identical offenses,"[164] the reason for concurrent sentences imposed by the trial court on the two counts involving possession by delivery.[165] But the opinion broke new ground in holding the sentences on the remaining counts—"convictions supported by evidence seized pursuant to a search warrant procured based on the dealing methamphetamine by delivery counts"—must also be served concurrently.[166] Thus, the sentence was cut in half, to sixteen years with four suspended.[167]

Justice Dickson, joined by Justice Massa, dissented, "believing the extraordinary relief of appellate sentence revision [was] not warranted in this case."[168]

In the other case, the court reinstated the trial court's sentence, reversing the court of appeals' reduction. In *Bess v. State*,[169] the defendant who asked his fourteen-year-old niece to sit on his lap and "kissed her on the cheek and tickled her" was convicted of Level 5 felony child solicitation.[170] The trial court sentenced him to the advisory term of three years, all executed in prison, but the

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160. Schumm, *supra* note 85, at 1047.

161. *Id.* at 1047-51.

162. 51 N.E.3d 169 (Ind. 2016).

163. *Id.* at 170.

164. *Id.* (quoting Gregory v. State, 644 N.E.2d 543, 544 (Ind. 1994)).

165. *Id.*

166. *Id.*

167. *Id.* at 170-71.

168. *Id.* at 171 (Dickson, J., dissenting).

169. 58 N.E.3d 174 (Ind.), *corrected on reh'g*, 65 N.E.3d 593 (Ind. 2016).

170. Although the original opinion stated the defendant "had her sit on his lap," the Court clarified in response to a pro se petition for rehearing that he "solicited his niece to sit on his lap and she declined." Bess v. State, 65 N.E.3d 593, 594 (Ind. 2016) (opinion on rehearing).

court of appeals found the fully executed sentence inappropriate and ordered his release to serve the remainder of his sentence on probation.[171] The Indiana Supreme Court affirmed the trial court's sentence in a short per curiam opinion, concluding its "collective judgment" was that the sentence was not inappropriate and did not warrant revision.[172]

Unlike the reductions of the Shepard-led court, which often reduced sentences in cases involving lengthy sentences imposed in child sex crimes cases,[173] the current justices have shown little inclination to reduce sentences in cases with child victims—instead limiting reductions largely to cases involving young defendants or drug-related crimes.[174]

2. Court of Appeals.—As explained in recent survey articles, the Indiana Supreme Court's decreased receptiveness to reducing sentences has been greeted by a similar trend in the court of appeals.[175] Instead of reducing several sentences each year (twenty-six in one survey period, sixteen in another) at the beginning of this decade, one or two reductions have become more common in recent years.[176] During this survey period, a net of three sentences were reduced,[177] which is just over one percent of the 255 requests from criminal defendants.[178]

The only reduction in a published opinion was in *Schaaf v. State*.[179] There, the defendant was sentenced to concurrent sentences for two offenses of dealing heroin.[180] The A felony count involved a sale of just "8/100ths of a gram of heroin for $50.00" while within 1000 feet of a public park.[181] The court characterized the offenses as "relatively minor as drug deals go: both sales were

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171. *Bess*, 58 N.E.3d at 175.

172. *Id.* In a third case, the justices granted transfer simply to address the language used by the court of appeals in rejecting a sentencing challenge. Specifically, in *Karp v. State*, 61 N.E.3d 271 (Ind. 2016), the three-justice majority in the 178-word per curiam opinion did not share court of appeals' assessment of the defendant's "sentencing argument," which had been described as "specious and not supported by cogent reasoning."

173. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937, 949 (2009).

174. Schumm, *supra* note 158, at 1047-48.

175. *Id.* at 1048.

176. *Id.*

177. As discussed above, the court of appeals reduced the sentence in *Bess*, but that reduction was vacated by the Indiana Supreme Court and therefore is excluded from the "net" count here. *See supra* notes 166-69 (discussing *Bess*).

178. The most recent year's data came from a Westlaw search of Indiana Court of Appeals' cases and is on file with the author. The author thanks Josh Woodward, Indiana University Robert H. McKinney School of Law Class of 2017, for his invaluable research assistance. The supreme court upheld the enforceability of plea provisions that waive a right to challenge a sentence on appeal in *Creech v. State*, 887 N.E.2d 73 (Ind. 2008). Although those provisions are now standard in many counties, they appear to be never or rarely used in other counties or before certain judges.

179. 54 N.E.3d 1041 (Ind. Ct. App. 2016).

180. *Id.* at 1045.

181. *Id.* at 1042.

to a confidential informant, both were monitored by law enforcement, and both involved very small amounts of heroin."[182] Nevertheless, the "defendant's criminal history would make below-advisory sentences inappropriately lenient" (he had been convicted of "six felonies and six misdemeanors") while "the nature of his offenses render[ed] his above-advisory sentences inappropriately harsh."[183] Thus, the court of appeals reduced the sentence to the advisory term of thirty years.[184]

Schaaf is unlikely to be relied upon much in the future because the crimes occurred before the 2014 overhaul of the criminal code, which significantly reduced sentences for most drug offenses. As the court explained in a footnote, had the defendant committed the offense three months later, he would have faced a sentencing range of just two to twelve years for the more serious charge.[185]

Sentences were also reduced in two memorandum (unpublished) decisions. First, unlike the offense-driven reduction in *Schaaf*, the reduction in *Jackson v. State*[186] was grounded in both the nature of the offense and his character. Although involved in a "brazen robbery" of a store that endangered employees and customers, the defendant was an accomplice who did not enter the store and no evidence suggested the extent of his involvement in planning the offense or any knowledge that his co-conspirators would rob a customer in addition to the store.[187]

As to the defendant's character, Jackson was only nineteen at the time of the offenses.[188] Moreover, he "pleaded guilty as charged without any concessions from the State, and this was his first felony case as an adult."[189] The opinion concluded his the forty-year sentence, "which will consume most of his adult life," was inappropriate but reduced it a mere five years to thirty-five years.[190]

Next, *Hampsch v. State*,[191] involved a challenge to a six-year sentence for sexual misconduct with a minor in Knox County, which was ordered served consecutively to a twenty-year sentence involving the same victim in another county.[192] Although concluding six years was not inappropriate, the court of appeals nevertheless ordered the sentence served concurrently with the other

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182. *Id.* at 1045.

183. *Id.*

184. *Id.*

185. *Id.* at 1045 n.2. As the opinion appropriately notes, though, "our legislature enacted savings clauses that specifically prohibit courts from taking the statutory changes into consideration when addressing offenses committed before July 1, 2014." *Id.*

186. No. 20A03-1510-CR-1693, 2016 WL 2626428 (Ind. Ct. App. May 9, 2016), *trans. denied*, 57 N.E.3d 816 (Ind. 2016) (unpublished disposition).

187. *Id.* at *3.

188. *Id.* at *4.

189. *Id.*

190. *Id.*

191. No. 42A01-1510-CR-1682, 2016 WL 2626619 (Ind. Ct. App. May 9, 2016) (unpublished disposition), *trans. denied*, 59 N.E.3d 252 (Ind. 2016).

192. *Id.* at *1-2, *4.

offense.[193] The defendant "committed both offenses in similar circumstances, less than a month apart, and both involved the same victim"; if the offenses had not occurred in different counties, "the trial court may well have ordered the sentences to be served concurrently."[194]

3. Appellate Rule 7(B) Burden on Appellants.—Judges on the court of appeals are divided on the burden that a criminal defendant must meet for a sentence revision under Appellate Rule 7(B). The language of the rule authorizes reductions when the appellate court "finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."[195]

In *Connor v. State*,[196] Judge Robb, joined by Judge Crone, cited numerous opinions supporting their view that Indiana courts have "frequently treated the two prongs as separate inquiries to ultimately be balanced in determining whether a sentence is inappropriate."[197] As the majority opinion explained, the

> reviewing court must *consider* both of those prongs in our assessment, and not as a requirement that the defendant must necessarily *prove* each of those prongs render his sentence inappropriate. In practice . . . we often exercise our review and revise power where only one of the prongs weighs heavily in favor of either affirming or revising the sentence.[198]

Judge Najam disagreed with the interpretation of Rule 7(B) but concurred in the result affirming the sentence.[199] In his view, an appellant must demonstrate inappropriateness in light of both the nature of the offense and character of the offender.[200] To hold otherwise, "dilutes our standard of review. Appellate revision of a sentence under Rule 7(B) is intended to be an exception reserved for those rare cases in which the defendant can satisfy both conditions."[201]

B. Possibility of an Increase

The power to review and revise sentences is not limited to reducing a sentence. The Indiana Court of Appeals increased a sentence for the first time on appeal in 2010 in *Akard v.* State,[202] where the ninety-three-year sentence was

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193. *Id.* at *5.

194. *Id.* at *4.

195. IND. R. APP. P. 7(B).

196. 58 N.E.3d 215 (Ind. Ct. App. 2016).

197. *Id.* at 218-19.

198. *Id.* at 219 (internal footnote omitted).

199. *Id.* at 222 (Najam, J., dissenting).

200. *Id.* at 223.

201. *Id.*

202. 924 N.E.2d 202 (Ind. Ct. App.), *aff'd in part, vacated in part*, 937 N.E.2d 811 (Ind. 2010).

raised to 118 based on the horrendous nature of the crime.[203] *Akard* relied on the supreme court's opinions in *McCullough v. State*,[204] which made clear the power to review and revise sentences included the ability to increase a sentence on appeal—but only when the defendant requested a sentence reduction.[205]

Just a few weeks after granting transfer and hearing oral argument in *Akard*, the supreme court unanimously vacated the increased sentence, emphasizing that the prosecutor had requested a ninety-three-year sentence in the trial court and the Attorney General had argued that sentence was appropriate on appeal.[206] The opinion was a narrow one that largely begs the question of when an increased sentence will be appropriate. The supreme court's rich body of case law had often applied principles when *decreasing* a sentence[207]—but not for *increasing* sentences, leaving appellate counsel hard-pressed to advise clients when they are at risk for challenging a sentence. Although no majority opinion since *Akard* has increased a sentence on appeal, two court of appeals judges wrote separate opinions during the survey period expressing their willingness to do so.

In *Kunberger v. State*[208] the defendant challenged his two-and-a-half-year sentence for criminal confinement, strangulation, and domestic battery, with all but six months suspended. The majority refused to reduce the sentence, reviewing both the serious nature of the offenses and the defendant's "flagrant violations of the no-contact order issued to protect the victim from further violence" as well as his statement to the victim in open court that he was "going to f* * *ing get [her]" at one hearing.[209]

Judge Pyle dissented, believing this "behavior toward the victim, combined with his outrageous lack of respect for the court's authority and his failure to abide by its no-contact order, warrant a fully executed sentence to the Department of Correction."[210]

The other case involved a challenge to an aggregate six-year sentence for criminal recklessness as a class D felony and failure to return to the scene of an accident resulting in serious bodily injury as a class D felony, which was

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203. *Id.* at 211.

204. 900 N.E.2d 745 (Ind. 2009).

205. *Id.* at 750-51.

206. 937 N.E.2d at 814. As explained in the 2011 survey, the Attorney General requested increased sentences several times in the months after *McCullough* was issued. Joel M. Schumm, *Recent Developments in Indiana Criminal Law & Procedure*, 44 IND. L. REV. 1135, 1156 (2011). That practice severely curtailed in the months and years following the supreme court's opinion in *Akard*.

207. For example, in *Smith v. State*, 889 N.E.2d 261 (Ind. 2008), the court cited the defendant's minor criminal history, and poor mental health balanced against his violation of the victim's trust and psychological abuse in reducing a 120-year sentence to sixty. *Id.* at 264. The opinion included a string citation of cases to demonstrate the revision was "consistent with this Court's general approach to [sentencing] matters." *Id.* at 264-65.

208. 46 N.E.3d 966 (Ind. Ct. App. 2015).

209. *Id.* at 974.

210. *Id.* at 975 (Pyle, J., dissenting).

enhanced by an habitual offender adjudication.[211] The majority declined to reduce the sentence, recounting that the defendant had participated in a fight before driving "aggressively" in parking lots where he struck three separate people, dragging one beneath his vehicle, resulting in injuries including a broken cheekbone and loss of two teeth.[212] As to character, the defendant had three prior juvenile adjudications and six felony convictions.[213]

Judge Crone wrote a separate concurring opinion, stating he "would have been inclined" to increase the sentence if the State had requested it.[214] He noted the "senseless decision to mow down [one victim] with his car instead of leaving the area, the severity of [the victim's] injuries, and [the defendant's] significant criminal history."[215] Nevertheless, he "reluctantly" concurred in the result because the trial court "was the sole factfinder at [the defendant's] trial and Appellate Rule 7(B) requires us to give 'due consideration' to its sentencing decision."[216]

C. Death & Life Without Parole Sentences Affirmed

Although sentencing is usually the sole function of trial judges, the jury plays a determinative role when the State seeks a sentence of death or life without parole.[217] Two cases, directly appealed to the Indiana Supreme Court because they involved such sentences,[218] addressed aspects of that statute.

In *Gibson v. State*,[219] a defendant sentenced to death argued that his probationary status was trivial enough to render a death sentence unconstitutionally disproportionate because the underlying felony bore no relationship to the present murder.[220] The court disagreed and affirmed the death sentence, noting both a distinct nexus between his probationary offense and his capital offense and that this "murder was the final act in a long string of [the defendant's] probation violations."[221]

Viewing Indiana's sentencing and parole statutes "in harmony," *Clippinger v. State*[222] upheld the imposition of consecutive life sentences without the possibility of parole.[223] The court noted the defendant's concession that the result

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211. Higgins v. State, No. 82A01-1409-CR-426, 2015 WL 5838150, at *2 (Ind. Ct. App. Oct. 7, 2015).

212. *Id.* at *5.

213. *Id.*

214. *Id.* (Crone, J., concurring).

215. *Id.*

216. *Id.* at *6.

217. IND. CODE § 35-50-2-9(e) (2016) ("If the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly.").

218. IND. R. APP. P. 4(A)(1).

219. 51 N.E.3d 204 (Ind. 2016), *cert denied*, 137 S. Ct. 1082 (2017).

220. *Id.* at 213 (citing Knapp v. State, 9 N.E.3d 1274, 1289-90 (Ind. 2014)).

221. *Id.* at 214.

222. 54 N.E.3d 986 (Ind. 2016).

223. *Id.* at 991.

would have no bearing on the amount of time he would serve in prison.[224]

VII. OTHER SENTENCING CLAIMS

Outside the realm of reducing sentences under Rule 7(B), the supreme court and appellate court addressed other sentencing challenges.

First, in *Bowman v. State*,[225] a defendant's heroin-dealing conviction was enhanced because he sold drugs from his apartment, which was less than 1,000 feet from a school.[226] He urged the adoption of the principle of "sentencing factor manipulation," which is recognized in some federal courts and "precludes sentence enhancement where law enforcement officials, for the purpose of increasing the defendant's sentence, engaged in conduct that was so outrageous or extraordinary as to violate the defendant's right to due process of law."[227] The Indiana Supreme Court declined, noting the defendant had "not met his *own* proposed standard" of outrageous police conduct; his decision to reside within 1,000 feet of a school was voluntary, and a three-year-old child who also lived at the apartment complex was present during the transaction.[228]

In *Jackson v. State*,[229] the court of appeals reiterated the importance of trial court issuing sentencing statements that will facilitate appellate review.[230] There, the defendant's sentencing was deferred during his participation in drug court.[231] His participation was terminated after he admitted "smoking a compound called Spice and driving another drug court participant to purchase Spice."[232] In sentencing him to the maximum term of twenty years, the trial court's short sentencing statement included that the defendant was "an active participant in helping other Drug Court participants evade detection for repeated drug use. So we have a situation where his criminal thinking not only harmed him but it directly participated in greater harm to other people."[233] Because "the trial court does not have the option of selecting a sentence based solely on the defendant's conduct apart from the circumstances of the crime," the court remanded "with instructions to the trial court to sentence Jackson for the offense to which he pled

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224. *Id.*

225. 51 N.E.3d 1174 (Ind. 2016).

226. *Id.* at 1177.

227. *Id.* at 1178 (internal quotation marks omitted).

228. *Id.* The justices have been receptive to reducing sentences under Appellate Rule 7(B) when an enhanced charge resulted from police action. *See, e.g.*, Walker v. State, 968 N.E.2d 1292 (Ind. 2012) (quoting Abbott v. State, 961 N.E.2d 1016, 1017-19 (Ind. 2012) ("[B]ut for the police officer's choice of location in stopping the car in which Abbott was a passenger, he would have received no more than the maximum three-year sentence for his possession of less than three grams of cocaine.")).

229. 45 N.E.3d 1249 (Ind. Ct. App. 2015).

230. *Id.* at 1252.

231. *Id.* at 1250.

232. *Id.*

233. *Id.* at 1251.

guilty, accompanied by a sentencing statement that is adequate to facilitate appellate review."[234]

Next, *Shotts v. State*[235] reiterated that "the offender risk assessment scores" from the evidence-based Indiana Risk Assessment System widely used in recent years in Indiana "do not in themselves constitute, and cannot serve as, an aggravating or mitigating circumstance."[236] Such assessments are prepared by probation officers and other administrators relying on data and evaluations that "are not necessarily congruent with a sentencing judge's findings and conclusions regarding relevant sentencing factors."[237] Nevertheless, the court of appeals found no error because "a review of the record ma[de] clear that the trial court was considering the score in light of what type, rather than length, of sentence to impose."[238]

Finally, turning to an issue that potentially impacts every prison sentence, a statute provides: "When the court pronounces the sentence, the court shall advise the person that the person is sentenced for not less than the earliest release date and for not more than the maximum possible release date."[239] In *Henriquez v. State*,[240] the court of appeals noted the clarity of the statutory language requiring an advisement of specific release dates.[241] But the opinion explained the incredible difficulty for trial courts "to determine these dates with any certainty" considering such things as other sentences imposed, "credit time earned before sentencing, the maximum amount of credit time in the current credit class, possible educational credit time, and the possibility of parole and probation violations and revocations down the road."[242] Although the trial court had failed to provide any potential release dates, the court of appeals affirmed, concluding "to the extent that the trial court 'erred' by failing to provide specific dates, estimated or otherwise, Henriquez ha[d] not shown that he was harmed in any way by this omission."[243]

Judge Baker dissented, noting the "General Assembly has mandated this action, and it is not within our purview to exempt trial courts from a mandatory statute simply because it may be difficult to comply with its requirements."[244] He would require remand for the trial court to provide the required advisement but

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234. *Id.*

235. 53 N.E.3d 526 (Ind. Ct. App.), *trans. denied*, 59 N.E.3d 252 (Ind. 2016).

236. *Id.* at 538 (quoting J.S. v. State, 928 N.E.2d 576, 578 (Ind. 2010)).

237. *Id.* (quoting Malenchik v. State, 928 N.E.2d 564, 573 (Ind. 2010)).

238. *Id.*

239. IND. CODE § 35-38-1-1(b) (2016).

240. 58 N.E.3d 942 (Ind. Ct. App.), *trans. denied*, 62 N.E.3d 1202 (Ind. 2016).

241. *Id.* at 943.

242. *Id.*

243. *Id.* at 944. In a shorter opinion on the same issue, the panel in *Simons v. State*, 54 N.E.3d 445, 447 (Ind. Ct. App. 2016), found the error harmless because "Simons ha[d] not alleged that he was prejudiced or harmed by the trial court's failure to advise him of his earliest release date and maximum possible release date."

244. *Henriquez*, 58 N.E.3d at 944 (Baker, J., dissenting).

agreed with the majority that "this lapse provides no relief for this defendant."[245]

VIII. RESTITUTION

Three cases addressed important issues regarding restitution: (1) the propriety of vacating or remanding an erroneous award, (2) the apparent conflict between statutory and case law for meth lab cleanup costs, (3) the impropriety of ordering restitution for a "deep dive" audit of employee theft, and (4) the necessity of providing evidence beyond the probable cause affidavit.

It is well-settled that trial courts may order restitution as a condition of probation but must inquire into the defendant's ability to pay.[246] In *Bell v. State*, the majority *vacated* a restitution order because of the rare circumstances that a defendant presented evidence of her inability to pay, the trial court made no further inquiry, and the State did not rebut the defendant's testimony.[247] *Remand* for a new restitution hearing, however, will be appropriate remedy when the defendant fails to provide evidence of the inability to pay and the trial court fails to make any inquiry.[248]

Justice Slaughter, in his first written words since joining the court, dissented in an opinion joined by Justice Massa, believing the appropriate remedy when a defendant cannot afford restitution is "remand to allow the trial court to enter a fully lawful sentence."[249]

Next, trial courts generally may not order restitution if it is not mentioned in a plea agreement or at the guilty plea hearing.[250] However, *Fisher v. State* involved an offense of dealing methamphetamine and a statute that requires trial courts to order restitution to cover the costs of environmental cleanup in such cases.[251] The court of appeals acknowledged the "apparent conflict" between the case law prohibition on ordering restitution unless it is included in the plea agreement, and the statute that requires restitution orders in methamphetamine cleanup cases.[252] Noting that "plea agreements are contractual in nature," the court concluded the "agreement implicitly incorporated the statutory restitution requirement," which was enacted more than a decade earlier.[253]

The restitution statute authorizes trial courts to order restitution for damages incurred "as a result of the crime."[254] In *Morgan v. State*,[255] a sales manager pleaded guilty to theft from her employer, and the State offered evidence of the

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245. *Id.*
246. IND. CODE § 35-38-2-2.3(a)(6) (2016); Bell v. State, 59 N.E.3d 959, 963 (Ind. 2016).
247. 59 N.E.3d at 966.
248. *Id.*
249. *Id.* at 967 (Slaughter, J., dissenting).
250. Fisher v. State, 52 N.E.3d 871, 873 (Ind. Ct. App. 2016).
251. *Id.* (citing IND. CODE § 35-48-4-17 (2016)).
252. *Id.*
253. *Id.*
254. IND. CODE § 35-50-5-3(a)(l) (2016).
255. 49 N.E.3d 1091 (Ind. Ct. App. 2016).

agreed-upon amount of the insurance payout.[256] The defendant challenged the award of an additional $16,000, arising from the controller's testimony at the restitution hearing that "additional monies were missing" based upon a "deep dive" audit.[257] The court of appeals agreed that additional amount was improper because the witness did not "offer testimony or documentation showing a nexus between those missing funds and conduct by [the defendant]," which is necessary to prove the losses were a "direct and immediate result" of her acts.[258] In addition, the award for the "deep dive" audit was improper based on precedent that expenditures "to determine the amount of a loss" fall outside the criminal restitution statute but may be subject to a civil claim.[259]

Finally, in *Garcia v. State*,[260] the defendant was ordered to pay restitution in a forgery case involving the sale of fake coins.[261] The State merely "asked the court to enter a restitution order in the amount reflected in the probable cause affidavit."[262] The court of appeals reversed the restitution order, holding "[m]ore was required," such as an affidavit from the victim.[263]

Judge Bradford dissented, concluding "under the circumstances of this case, a probable cause affidavit whose authenticity and accuracy have not been questioned, much less shown to be suspect, may be considered by the trial court in ordering restitution."[264] He also expressed concern with "requiring the victim to appear at sentencing or file an affidavit of loss in potentially every restitution case," which is an "unnecessary and unwarranted re-victimization" and imposes an "unacceptable burden" on Indiana's high-caseload criminal justice system.[265]

The Indiana Supreme Court denied transfer by a 3-2 vote (Chief Justice Rush and Justice Massa dissenting from the denial),[266] suggesting the issue might resurface in a future case, especially as the court's membership changes.

IX. CHALLENGES TO PROBATION CONDITIONS AND PROBATION REVOCATION

A number of cases addressed challenges to probation conditions imposed by trial courts or various aspects of trial courts' revocation of probation.

First, in *Meunier-Short v. State*,[267] the court of appeals held requiring a defendant "to return to school and maintain a 'C' average while also working full

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256. *Id.* at 1094.

257. *Id.*

258. *Id.*

259. *Id.*

260. 47 N.E.3d 1249, 1253 (Ind. Ct. App. 2015), *trans. denied*, 46 N.E.3d 1240 (Ind. 2016).

261. *Id.* at 1250-51.

262. *Id.* at 1253.

263. *Id.*

264. *Id.* at 1254 (Bradford, J., concurring in part and dissenting in part) (internal footnote omitted).

265. *Id.* at 1255.

266. 46 N.E.3d 1240 (Table).

267. 52 N.E.3d 927 (Ind. Ct. App. 2016).

time" as conditions of probation was "not reasonably related to [the defendant's] rehabilitation or the public's safety."[268] The case was remanded to the trial court with instructions to provide "the option to either maintain full time employment or 'faithfully pursue' a course of study that will equip him for suitable employment."[269]

Other cases dealt with the propriety of revoking a defendant's probation. In *Trammell v. State*,[270] the court of appeals reversed the revocation of probation because the State failed to prove the alleged violation occurred during the defendant's period of probation. The court declined to find the defendant had "invited any error because he did not assert during the revocation hearing that he was not on probation and admitted to the acts alleged."[271] Rather, it found the defendant was "under no obligation to point out to the State that it has failed to prove its case" and noted that an "admission to the conduct is not an admission that he has violated probation by engaging in that conduct."[272]

Although most claims asserted on appeal must first be raised in the trial court, in *Hilligoss v. State*[273] the court of appeals found fundamental error when the trial court failed to ensure that a probationer who admitted a probation violation had received the required advisements.[274] Because the record was silent regarding whether the defendant was advised, the court was compelled to conclude he was not properly advised and thus remanded to the trial court.[275]

Finally, although a community corrections case, *Sullivan v. State*[276] relies on probation revocation cases and principles. There, the court of appeals reiterated that "zero tolerance" policies in which any violations automatically result in the revocation are "constitutionally suspect."[277] Despite a defendant's admission, he "must still be given an opportunity to offer mitigating evidence suggesting that the violation does not warrant revocation."[278] In response to the allegation that he did not report to begin his sentence on home detention, "the defendant offered evidence that his house and phone were approved for home detention, that he was hospitalized at the time he was to report, and that he was under the impression his

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268. *Id.* at 937.

269. *Id.* The court also noted "a division of authority" among panels regarding whether defendants must object to probation conditions in order to preserve the issue for appeal. *Id.* at 936. Relying on the majority approach the court held no objection was required, analogizing "the appeal of a probation condition to an appeal of a sentence, which we may review without insisting that the claim first be presented to the trial judge." *Id.* (internal quotation marks and citation omitted).

270. 45 N.E.3d 1212 (Ind. Ct. App. 2015).

271. *Id.* at 1216.

272. *Id.* at 1216-17.

273. 45 N.E.3d 1228 (Ind. Ct. App. 2015).

274. *Id.* at 1232 (citing IND. CODE § 35-38-2-3(e) (2016)).

275. *Id.*

276. 56 N.E.3d 1157 (Ind. Ct. App. 2016).

277. *Id.* at 1162.

278. *Id.* (quoting Ripps v. State, 968 N.E.2d 323, 326 (Ind. Ct. App. 2012)).

counsel would contact the court and community corrections."[279] The court of appeals reversed the revocation and resulting prison sentence based "on the totality of the circumstances, including the nature of the violation and sanction," remanding for placement in community corrections.[280]

279. *Id.*
280. *Id.* at 1162-63.